Supreme Court of the United States.

No. ~~128~~.

THE N. O. CANAL AND BANKING CO.

versus

A. B. MONTGOMERY, ET AL.

THOS. HUNTON,
Of Counsel for Complainants.

Clark & Hofeline, Book Printers, 112 Gravier St.

Supreme Court of the United States.

No. 128.

THE N. O. CANAL AND BANKING CO.

versus

A. B. MONTGOMERY, ET AL.

Brief for Appellant.

The facts of this case are as follows: On the 22d May, 1866, Estlin & Co., a commercial firm of New Orleans, having a large debt against A. B. Montgomery, of Mississippi, effected a settlement with him, by taking his notes for various amounts aggregating $158,777, which were secured by a Deed of Trust on a very valuable plantation in Washington Co., described as being in *Township 17, Range 8 West.*

After making this settlement, and after having made with the assistance of the Deputy Clerk of the Recorder, a thorough examination of the Records, without finding any other incumbrance on the lands, Estlin returned to New Orleans, with the notes thus secured, and made a compromise with his creditors whereby they received the

secured notes of Montgomery, and surrendered their notes and claims against the firm of Estlin & Co., releasing the latter from all liability.

The conveyance in the Deed of Trust was made to *W. L. Nugent* and *W. G. Yerger*, as Trustees. This conveyance purported to be of 3067 acres.

In 1867, one James Bosley of Tennessee, filed his Bill against Montgomery, alleging a large indebtedness due since 1858, and praying a decree for the sale of certain lands—*2360* acres—lying in Washington Co., Mississippi, in Township 17, *Range 9 West*, and which he alleged had been conveyed by Deed of Trust in 1848, to John Overton, Trustee, to secure the payment of Montgomery's indebtedness to him. The only parties to this suit were A. B. Montgomery and wife. They entered appearance Oct. 4, 1867, through *W. L. Nugent* as Counsel, *the same Nugent who was one of the Trustees in the Estlin Deed.*

No answer was filed by the Defendants, and on the 5th of November, 1867, a decree *pro confesso* was entered, and on the following day, a final decree was rendered directing Alex. Yerger, the substituted Trustee, to sell the land, *mentioned in the Deed of Trust*, that is to say, the 2360 acres of land in T. 17, Range *nine* West. Trans. pp. 40–1–2–3.

On the 15th November following, the Court by consent of *Complainant*, modified its decree of Nov. 6th, which had directed a sale for cash and after advertisements and notice "in the manner provided in the Deed of Trust." The modified decree directed a sale for one-half cash—

and that notice of the sale should be given by posting on the door of the Court House—whereas the Deed of Trust provided that the "advertisement should be made in three public places in Washington Co." p. 39.

The land *described in the Bosley Deed of Trust* was sold, and on the 8th of February, 1868, was conveyed to Bosley for the price of $7,500.

The object of the Bosley suit having thus been accomplished as was supposed, A. B. Montgomery's title having been divested by the parties, without any answer filed or objection on his part, the said Montgomery a few days afterwards, to-wit, on the 18th of February, 1868, went into bankruptcy.

After the termination of these proceedings by the sale,—execution of a Deed to Bosley—and a Receipt by Bosley to the Trustee for $7,500—in furtherance of the combination alleged in the Bill of Complainant to shield the lands of A. B. Montgomery from the pursuit of his creditors, Bosley, in a short time after his purchase at Trustee's Sale, conveyed the lands purchased to Victor Montgomery, in trust for the children of A. B. Montgomery, for the consideration expressed in the Deed, of $15,000, giving only a special guarantee of title. Two of the said children, viz: W. F. and Davidella, being minors. Trans. p. 18.

Thus far, the combination between Bosley and A. B. Montgomery acting through his counsel, W. L. Nugent, (who was, as Trustee under the Estlin Mortgage, representing interests of creditors adverse to Bosley), was

apparently successful. Unfortunately however for the schemes of these parties, it was discovered that the lands described in the Estlin Deed of Trust of May, 1866, were not covered by the Bosley Deed made in 1848, and that the conveyance by Yerger, Trustee, to Bosley, on the 8th of February, 1868, of 2360 acres in Range *nine* West, did not touch the 3067 acres described in the Estlin Deed as in Range *eight* West.

To remedy this fatal defect in the Title to the Montgomery estate, a Bill stated to be "in the nature of a Supplemental Bill" was filed after the termination of the foreclosure proceedings, by or in the name of Charles Bosley, alleging that there was an error in the description of the lands intended to be conveyed to Overton, Trustee, in 1848, and praying the Court to correct the error in the Deed of Trust, and also in the Deed made by Yerger, Trustee to the Complainant Bosley.

A. B. Montgomery, *then an adjudicated Bankrupt*, without any interest in the lands or in the suit, his wife and Yerger, the Trustee, alone were made parties to this proceeding. Neither the Assignee of Montgomery nor the creditors who held the Estlin Deed of Trust, and who alone were interested in the question, were made Defendants.

Of course A. B. Montgomery did not answer the Bill. A *pro confesso* was entered and a final decree rendered July 8th, 1868, correcting the alleged misdescription in the original Deed of Trust made in 1848, and ordering Montgomery and wife, and Yerger, the Trustee, to make

conveyances to Bosley, according to the amended description. p. 55. It does not appear however that these conveyances were made as directed.

The present complainants filed their Bill to have all the foregoing proceedings by Bosley declared null and void for want of proper parties and for other reasons, and praying that the lands conveyed in trust for the benefit of Estlin & Co. be subjected in the hands of the assignee of Montgomery to their notes secured by the Deed of Trust, and for other relief.

On the hearing of the case, the Court (Trans. p. 96) decreed:

1st. That the sale made by Yerger, Trustee, to Bosley on the 8th of Feb., 1868, of the lands described in the Bosley Deed of Trust dated in July, 1848, was null and void.

2nd. That the Deed to Bosley purporting to convey said lands was null and void.

3rd. That the proceedings under Bosley's Bill for the correction of the alleged mistake in his Deed of Trust, "including all the decrees and orders had in said proceedings," were null and void, and that the Deed made by Alex. Yerger, substituted Trustee, and A. B. Montgomery and wife, under the final decree in said supplemental proceedings, was null and void.

No appeal has been taken by Bosley or any of the Montgomerys, from this portion of the Decree. The complainants here acquiesce in its correctness, and thus far the decree is final.

But the Court decided:

4th. That the Deed in trust made by A. B. Montgomery and wife on the 13th July, 1848, to secure a debt due to Bosley, be reformed and corrected, and that the deed be so corrected, as to locate the land in Range No. 8, instead of Range No. 9 West, and, "that said deed so corrected and reformed shall stand as a first lien on the land so described and located in Range No. 8 West, for the security of the debt mentioned in said Deed." Trans. p. 98.

It is now urged that this portion of the decree in paragraph 4, is erroneous, for the following reasons:

1st. Because "the proceedings by the Supplemental Bill, including all the decrees and orders had in said proceedings," having been declared null and void, *there remained no pleadings in the case to authorize a decree reforming and correcting the Bosley Deed of Trust.*

The case then stood on the Bill and answers. Bosley had taken proceedings to have his Deed reformed. His proceedings were adjudged to be null and void. He did not appeal. He is not before this Court, and no other party has filed a Bill or Cross Bill to have the Deed reformed.

2nd. Because the complainants holding notes secured by the Estlin Deed, which they had taken for value, and without notice, either actual or constructive of any prior incumbrance, could not be affected by any alleged mistake in the Bosley Deed. It is not pretended that they had any actual notice of the Bosley Deed.

There was no constructive notice resulting from Registry. For the Record of a Deed for 2360 acres of land in Range 9 West, could not possibly be notice to parties that such a Deed covered or was intended to cover 3067 acres in Range 8 West. Besides, when Estlin produced his Deed of Trust to his New Orleans creditors, and induced them to accept the notes secured by this Deed, and surrender the obligations of Estlin & Co., these creditors found endorsed on the Deed, the certificate of the Clerk and *ex officio* Recorder of Washington County, Miss., to this effect—"*that there is no other Mortgage or Deed of Trust on Record, to any of the land described in the Deed of Trust from A. B. Montgomery to Nugent and Yerger, Trustees, to which this certificate is attached.*" Trans. p. 10.

Some evidence was taken in the case in reference to the question whether Estlin, at the time the Deed of Trust was made, had notice of the Bosley Deed.

We submit that such evidence is unavailing against the present complainants who took the Montgomery notes without notice and for value, before maturity and on the certificate of the Recorder, that there was no prior incumbrance on Record. The Assignees of Estlin could not be bound by matters *en pais*, between Estlin and Montgomery. They could only be held and bound by the Records, unless actual notice was given to them.

But this proof fails to establish that Estlin had notice. Estlin in his Deposition, p. 70, says: "*I had no knowledge*, at the time the Deed of Trust was executed and given to me that there existed any other mortgage Deed of Trust

or incumbrance on the property therein described. *I was assured and firmly believed* that the property was free and unincumbered from any other mortgage than ours."

Trigg, a Deputy Clerk of the Recorder, assisted Estlin for several days in examining the Records. His testimony confirms that of Estlin. p. 74.

On the other hand, the depositions of A. B. Montgomery and of *W. L. Nugent, one of the Trustees under the Estlin Deed*, and the Attorney of the defendants engaged to defeat the Estlin Deed which, as Trustee, he had undertaken to execute in favor of Estlin, were taken.

These depositions were taken at *Greenville.* It is a noticeable fact that they were taken without notice to the complainants, or to Valliant, the Assignee of A. B. Montgomery, who resided in the town of Greenville. Mr. Nugent, the Attorney of the defendants, gave his own deposition, *ex parte*, without notice, and because he resided more than 100 miles from Jackson, where the Court was held. These two witnesses speak of a casual remark made by Montgomery to Estlin, that Bosley had a prior ~~Deed of Trust~~ Mortgage on "*Swiftwater Plantation.*" These are the only witnesses who speak of this notice to Estlin, except Haycraft, who certified on the Estlin Deed of Trust that there was no other incumbrance on it. I submit that the complainants should have had notice of the taking of these two depositions. There is no reason why they should not have had notice. There were eighteen other depositions taken at Greenville, upon minor points, and all these were taken on notice to Valliant, *at Greenville.*

The Court has so often reprobated the practice of taking important testimony *ex parte*, under the Act of Congress, unless there is some good reason therefor, that we think this testimony will hardly suffice to overthrow that of Trigg and of Estlin.

But the Court will observe that neither Montgomery nor Nugent prove that Estlin was notified or that he had any reason to believe that "those several tracts of land" mentioned in his Deed of Trust, were covered or intended to be covered by the Bosley Deed.

Montgomery says he spoke to Estlin of a *mortgage* on "*Swiftwater*" Plantation held by Bosley. Nugent speaks only of mention of a mortgage on "*Swiftwater*"

Montgomery was a large land holder. The Record shows that he held many lands in the County. p. 94. It is to be presumed that Estlin knew what tract was designated by "*Swiftwater*." Neither the Estlin nor the Bosley Deed of Trust designates the land conveyed as the "*Swiftwater Plantation*," and inasmuch as Estlin had, only the day before the alleged conversation between himself and Montgomery, received a Deed of Trust on several tracts of land, which were not called or designated as "Swiftwater," is it not fairly to be inferred that he did not know what plantation was alluded to, when Montgomery spoke of Bosley's "*mortgage*" on Swiftwater, and therefore that he had no notice of Bosley's incumbrance by Deed of Trust?

It is not doubted that if there was really a mistake in the description and location of the lands conveyed by the

Bosley Deed, this mistake *as between Montgomery and Bosley*, might have been corrected at any time before the 22d May, 1866, by appropriate proceedings. But it is submitted to the Court, that after the rights of third parties had supervened and attached to the lands to be affected, no such correction could be made.

To give effect to the correction made, is to deprive the complainants of a security which they took in good faith, and to subject them to a loss, without any fault on their part.

We invoke in favor of complainants the principle of Law—that where one of two innocent parties must suffer he must bear the loss, through whose fault, negligence or mistake the loss occurs. The complainants would not have taken the notes secured by the Estlin Deed, and surrendered their claims against Estlin & Co., if the Records had shown that the lands conveyed in Trust were incumbered by the Bosley Deed. The loss should therefore fall on Bosley, who negligently accepted a Deed misdescribing the lands.

It is insisted therefore, that the Court erred in the matters decided in paragraphs 4 and 5 of the Judgment, p. 96, in so far as it reformed the Bosley Deed, changed the location of the land conveyed and established in favor of that Deed a prior lien on the land conveyed in the Estlin Deed.

In paragraph 6 of the judgment of the lower Court, it is "decreed that there was due to Victor Montgomery, Davidella and Wm. F. Montgomery, (children of A. B.

1st Story's Eq. Juris. Sec 165
Lambert vs. Nice 41 Maine 475
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M.,) assignees of Charles Bosley, on the 30th of June, 1868, the date of their purchase from Charles Bosley, the sum of $15,000 of the debt secured by said Deed in Trust to Bosley," etc.

It is impossible to find anything in the Record to warrant this portion of the decree.

The only intimation found in the Record, that Victor and the minors Davidella and W. F. Montgomery, were assignees of any part of the Bosley debt, is in this Decree.

These parties do not claim to be assignees. On the contrary, they aver in their answer, p. 26, that Bosley acquired a complete title to the lands conveyed in the Estlin Deed of Trust, by virtue of a sale and conveyance to him by Alex. Yerger, Trustee, on the 8th Feb., 1868,—and that Bosley conveyed *said lands to respondents* on the 30th June, 1868, for the consideration of $15,000—that Bosley had a good title, and they claim as *purchasers* from him.

These parties do not claim to be creditors of A. B. Montgomery by virtue of an assignment to them of a portion of the Bosley debt. They do not ask to be paid out of the proceeds of sale of the land. On the contrary, they plant themselves, in their answers, on their purchase from Bosley and claim the land as owners. This answer is a very full one and is signed by *Nugent and Yerger, Solicitors, the same who were Trustees under the Estlin Deed, and who are thus endeavoring to defeat their own title as Trustees.*

But it must be remembered that in paragraph 2 of the judgment of the Circuit Court, it was decreed that the

sale of Alex. Yerger, Trustee, to Charles Bosley, on the 8th of Feb., 1868, was null and void. This was the title set up in the answer of Victor M. as valid, and under which he claims.

Charles Bosley having no other title than that derived from Alex. Yerger, Trustee, and this being adjudged *null and void*, how could he convey a title to Victor and the other children of A. B. Montgomery?

The Court had nothing before it upon which to base the portion of the decree now under consideration but the Bill and answers. The concession in favor of Victor Montgomery and his co-defendants, was unasked and unsought. It is inconsistent with the position assumed by them in their pleadings. They do not claim to be assignees of the Bosley debt or any part thereof.

But we say that if the pleadings were such as to authorize this portion of the decree, nevertheless the circumstances and evidence in the cause, do not sustain the decision of the Court.

Although all of the proceedings under the Supplemental Bill of Bosley to reform his Deed of Trust were declared by the Court null and void, yet, to elucidate the case it may be necessary to refer to them.

The Bill alleges that there was a fraudulent arrangement made by Bosley and Montgomery, whereby the former was to buy the property conveyed by the Estlin Deed and then convey to the children of Montgomery.

There are many circumstances supporting this position.

1st. Bosley filed his Bill to foreclose his Deed of Trust

in Mississippi, on the 1st of June, 1867. On the 24th of April preceding, he had sued out an attachment in Nashville, on 265 acres of land in that city. This land was very valuable and was estimated at $300 per acre. p. 23.

It is hardly probable that an attachment of the Nashville property estimated at $79,500, would have been followed so soon by proceedings *bona fide* in Mississippi. The alleged debt to Bosley had been due since 1858. Why did Bosley proceed in Mississippi without waiting the result of his attachment, in Tennessee? For aught that appears, his alleged debt was made by the attachment. The object was apparently to defeat the Estlin Deed.

2nd. The decree of sale in the Bosley suit, directed the land to be sold for ½ Cash, the balance on time. p. 44. Victor Montgomery was of course apprised of the time of sale. He was living on the place at the time. If he and his friends had proposed to buy the place in good faith, why did he not make his arrangements to bid on it? It seems from the testimony of J. R. Yerger, p. 82, that Bosley had instructed him to bid only $10,000 for the land. Victor could then have bought at any bid above $10,000, and on more favorable terms than he subseq ently bought.

But he made no bid. As soon as the sale was made, according to defendant's testimony, he immediately set about the purchase from Bosley, which in a few months afterwards was effected at double the price which Bosley had bid, and this in Cash.

What is the explanation of all this? Simply that it

X Sargent testifying in 1873, states he had no doubt the whole of the Bosley debt would be made out of the Nashville property. p. 140. There is no evidence that this was not done

would have subjected the transaction to suspicion at once, if the children of Montgomery had bought the property at the Trustee's sale, because Victor, the elder, who subsequently took the title from Bosley was only 21 years of age, and Davidella and W. F. were still minors, and it was deemed best that there should be an intermediary purchaser, and in the meantime that A. B. Montgomery should go into bankruptcy, which he did in ten days after Bosley's purchase.

3rd. The children of A. B. Montgomery had no property at the time of the alleged purchase. See answers to the 11th Int. to Complainant's Bill. The possession of the land was not changed by Bosley's purchase. It is true A. B. Montgomery acknowledges that after the sale he held the land as Bosley's tenant "*unless some other permanent arrangement is made between the parties.*" p. 83. This acknowledgement was made on the day Bosley purchased. And so it would appear that even at this date, some other *permaneut arrangement* was contemplated "between the parties;" and the only parties at that day were Bosley and Montgomery himself. The tenancy at will was a pretext well understood. Nugent, in his testimony however, states that Victor and W. F. Montgomery leased the land after Bosley's purchase, not A. B. M.

4th. There is some discrepancy between the testimony of defendants and their witnesses, as to the manner in which Victor Montgomery raised the $15,000.

The three principal, if not the only witnesses who speak to this point are W. L. Nugent, Robert Allison and

N. J. W. Wortham, the father-in-law of Victor Montgomery. The depositions of these witnesses were all taken, *ex parte*, without notice, at Greenville, the residence of the Assignee of Montgomery.

Victor states in his sworn answer that Nugent sent *A. B. Montgomery* to Missouri to get $10,000 from Robert Allison. p. 30. Allison says that *Mrs. Montgomery*, wife of A. B., came to his house with reference to the matter, and he was induced to take the $10,000 to Nashville. p. 92. Whilst it would appear from A. B. M.'s statement in his answer, that Nugent was the Financier.

It is possible that complainants might have established with greater certainty, how and for whom this money was raised, if they had had an opportunity to cross examine the witnesses.

It may not be doubted that Victor Montgomery received $10,000 from Allison, and $5,000 from his mother and W. L. Nugent, and that he personally handed this money to Bosley's agent. But under all the circumstances there is little doubt that all this was effected by, through, and for A. B. Montgomery. ✗

As hereinbefore stated, neither Victor nor A. B. Montgomery received any title from Bosley to the land covered by the Estlin Deed. The conveyance made by Bosley to Victor Montgomery on the 30th June, 1868, p. 17, was made pending the proceedings to reform the Bosley Deed of Trust and in anticipation of a decree reforming the Deed. But the Court annulled all these proceedings, annulled the sale by the Trustee to Bosley, and so Bosley had no title to the land, and could convey none.

✗ A. B. M. paid Taxes on these Lands as late as 1871 — 3 years after his Bankruptcy. p. 135

Witness and atty. R. L. Sargent

It is claimed by the defendants, that Bosley *assigned* to Victor all of his pretended debt due by A. B. Montgomery. No written evidence is produced to show this. The only transaction between Bosley and Victor was the sale by Bosley, with *special guarantee only*, to Victor, for the alleged consideration of $15,000. evidenced by the bill of sale. p. 17. In his answer, Victor does not claim to be an assignee, and the pretended assignment was a mere after-thought.

It is manifest for the foregoing reasons that the decree of the Circuit Court was radically erroneous.

The decree of the Circuit Court required that an account should be taken of the rents of the Plantation and of the valuable and permanent improvements put on the place by Victor M., and of the taxes paid by him.

We do not consider it material to investigate critically the Reports of the Commissioners, since we do not doubt that the decree of the Circuit Court must be reversed.

We deny that under the Law, the defendant, Victor Montgomery, is entitled to *any credits for expenditures*. They were all made *pendente lite—after* this suit was brought to subject the lands claimed by him, to the debts secured by the Estlin Deed of Trust of which he had notice, being a party to the suit. He had no right to constitute himself a creditor of complainants with liens upon the lands held in trust for them, without their consent. He had no title to the land. The land vested in the assignees of A. B. Montgomery from the 18th of February, 1868, before his pretended purchase from Bosley, and the

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Court has so decreed, and that these lands must be administered in bankruptcy. This decree is final and has not been brought up by appeal by Victor Montgomery.

If these lands are to be administered in the Bankruptcy of A. B. Montgomery, then it is clear that the right and title of the Assignee dates from the day of the adjudication in bankruptcy, *and it is impossible that Victor Montgomery can be allowed a claim* for permanent improvements made on the bankrupt estate, under a title acquired *after the bankruptcy* and pending the litigation, concerning the land.

But the Report of the Commissioners, p. 99, is obviously incorrect. For example; some $2535 is allowed for cleaning out ditches; $1825 for putting new rails on fences; $2500 for building a new dwelling house, etc., etc. The two first items are clearly not for permanent improvements. The latter was wholly unnecessary.

Again, the proof is, pp. 23 and 99, that for the year 1869, the Plantation, not including 100 acres cultivated by Montgomery, rented for $6,000.

It is proved that such lands rented in the neighborhood for $8 to $10 per acre, and that there were 1500 acres of cleared land in the tract, and yet after the improvements put upon the land by Victor Montgomery, as shown on p. 99, and which necessarily enhanced the rental value of the lands greatly, the Commissioners only charged Victor Montgomery with the annual rent of $4,000 after the year 1869. or about $2.20 per acre, for the cleared land.

The Report of the Commissioners was excepted to, p. 164, and ought to have been rejected.

It is respectfully asked that the decree of the Circuit Court be reversed, and that the lands described in the Deed of Trust, a copy of which is found on pp. 8 & 9 of the Transcript, be decreed to be sold by F. Valliant, Assignee in Bankruptcy of A. B. Montgomery, and the proceeds divided *pro rata* among the creditors named in the Bill—they being the only parties who have prosecuted this appeal or contributed to the expenses incident thereto.

Respectfully submitted,

THOS. HUNTON,

Of Counsel for Complainants.

IN THE SUPREME COURT

OF THE UNITED STATES.

No. 21.

NEW ORLEANS CANAL AND BANKING COMPANY

vs.

A. B. MONTGOMERY, *et al.*

P. PHILLIPS,

For Appellants.

October 4, 1877.

R. O. Polkinhorn, pr.

Supreme Court of the United States.

NEW ORLEANS CANAL AND BANKING COMPANY
vs.
A. B. MONTGOMERY, *et al.*
No. 21.

The bill in this cause is to enforce the execution of a deed of trust from A. B. Montgomery to William L. Nugent and William E. Yerger. The deed was made the 22d of May, 1866, and acknowledged and recorded the 24th of the same month, and is to secure Montgomery's sixty promissory notes, amounting in the aggregate to $158,777.55, running through a period of five years, and payable to Montgomery's own order, with six per cent. interest from the 1st of January, 1866; and the property conveyed by the deed is 3,067 acres of land in Washington County, Mississippi, (p. 8). The notes thus secured were endorsed and delivered by Montgomery to R. W. Estlin & Co., of New Orleans, to whom, the bill avers, he was indebted; and Estlin & Co. immediately thereafter delivered to complainants certain of these notes which are described in and exhibited with the bill (pp. 10–17), and the complainants say they do not know who are the holders of the remainder of the said notes, but they invite them to come in and share the benefits of this suit.

On the 18th of February, 1868, Montgomery was adjudged a bankrupt, and on the 19th of May following, F. Valliant was appointed his assignee.

The complainants aver that it was Montgomery's assurance to R. W. Estlin, that there were no prior liens on the land conveyed by the trust deed, and Estlin's inability to find any prior liens after examination, that induced him to take the trust deed as security, and transfer to complainants the notes described in the bill, which he did immediately after the execution of the trust deed, and complainants aver that none of them or of the members of the firm of Estlin & Co. had any knowledge or notice of any lien or incumbrance on the said lands.

On the 13th of July, 1848, A. B. Montgomery and wife conveyed to John Overton, certain lands in said Washington County, in range 9 west, in trust to secure a debt of $14,000 from Montgomery to one Charles Bosley (p. 37), and on the 1st of June, 1867, Bosley filed a bill to foreclose this deed of trust (p. 34), and the lands embraced by it were sold to Bosley under a decree of foreclosure for $7,500 in cash, the 8th of February, 1868, and conveyed to him the 28th of March, 1868. (p. 45.)

On the 27th of March, 1868, Bosley filed a bill against Montgomery and wife, and Alexander Yerger, who had been substituted for Overton as trustee in the trust deed to secure Bosley, to correct an alleged mistake in the description of the lands conveyed by the trust deed to secure Bosley, and in the deed conveying these lands to Bosley, and on the 8th July, 1868, a decree was entered in this suit making the correction prayed for in the bill in such wise as to make the said deeds cover the bulk of the property conveyed by the trust deed to secure Estlin & Co. (p. 47.) This bill was filed after the sale to Bosley, and after Montgomery had been adjudged a bankrupt, and complainants aver that the proceedings under it were void because neither the assignee Valliant, nor any one having an interest in said lands was made

party thereto, and that, consequently, Bosley acquired no title thereby.

On the 30th of June, 1868, Bosley, before he had any pretence of title to the lands covered by the Estlin deed of trust, as complainants aver, conveyed the same to Victor Montgomery, William F. Montgomery and Davidella Montgomery, children of A. B. Montgomery, for the alleged consideration of $15,000. (p. 17.)

Complainants deny that at the time Bosley filed his foreclosure bill there was any indebtment from Montgomery to him, and aver that Bosley had agreed with A. B. Montgomery and J. W. Montgomery to release A. B. Montgomery, and accept J. W. Montgomery as his debtor for the amount of the former's debt, he, Bosley, retaining a lien which he had already acquired on lands in and around Nashville, which A. B. Montgomery had sold and conveyed to J. W. Montgomery, and releasing his lien on the lands in Mississippi; and complainants aver that it was in furtherance of a fraudulent scheme to injure complainants that Bosley filed the foreclosure bill, bought the lands sold under it and conveyed the same to A. B. Montgomery's children, and that Victor Montgomery was a party to said fraud as were also W. T. and Davidella Montgomery, as far as they could be, being minors.

Complainants aver that the plantation conveyed by the Estlin trust deed contained two thousand acres of cleared land, and produced before the war annually from eighteen hundred to two thousand bales of cotton; that the buildings and improvements on it were of the most substantial and costly character; that all its appointments were of the most approved kind, and that it escaped the ravages of the war, and was, at the time of the alleged sale to Bosley, in complete order and condition.

Complainants aver that the children of Montgomery

had no private estate of their own, and that if any consideration was paid Bosley it was paid by Montgomery himself, who, they aver, has continued to own and enjoy the said plantation.

Complainants aver that none of the notes held by them have been paid, although some are due, and they pray that Bosley's deed to Victor Montgomery may be declared void, and that the debt from A. B. Montgomery to Bosley may be decreed to have been satisfied, or the deed of trust to said Bosley may be decreed to be of no effect, as against complainants, and that the said proceedings, to correct the alleged mistake in the trust deed to secure Bosley, may be declared null and void as to complainants, and that Nugent and Yerger, the trustees in the Estlin trust deed, may be removed, and the land embraced by that deed sold by the assignee, Valiant, or that the assignee, Valiant, may be required to redeem the said trust deed, &c., and that A. B. Montgomery, Victor, William F. and Davidella Montgomery, may be made defendants, and that process may issue against A. B. Montgomery, "as the father of said minor defendants, William F. and Davidella Montgomery."

The bill was answered by A. B. Montgomery, Victor Montgomery, William F. Montgomery and Davidella Montgomery, and taken for confessed against the assignee, Valiant, W. L. Nugent and W. G. Yerger. (p. 69.)

In his answer (p. 20) A. B. Montgomery denies that he represented to Estlin, before the execution of the trust deed, there were no prior liens on the lands embraced in that deed; on the contrary, he says he told him of the Bosley debt and deed of trust, and that he, Estlin, treated the information with indifference, in view of the value of the lands. He says that Estlin's object in obtaining the trust deed was to relieve himself as ac-

commodation endorser of respondent, and denies that Estlin found no prior liens on examination. Respondent says that Bosley has a paramount lien by virtue of his trust deed, notwithstanding the mistake in the range, and denies that there was any agreement by which respondent was relieved from the debt to Bosley, and the lands in Mississippi were released from the lien in favor of Bosley. Respondent denies fraud in the sale by Bosley to Victor Montgomery, and states how the purchase money was raised, and denies that any part of the purchase money was raised by or through him, or that there was fraud or collusion between him, Victor Montgomery and Bosley, and as to all matters not fully answered by him, respondent refers to and adopts the answer of Victor, W. F. and Davidella Montgomery.

In their answer (p. 24,) Victor, W. F. and Davidella Montgomery, deny that on the 22d May, 1866, their father was indebted to Estlin & Co. in the sum of $158,777.55, and say, on information and belief, that the real cash balance due was $28,064.76, and that as to the rest of the debt of $90,312.79, Estlin & Co. were liable as accommodation endorsers for their father, and that the trust deed was given to relieve them from that liability, by enabling them to take up the old notes which were held by third parties, and respondents say that the debt claimed against their father comprehends a large sum for usurious interest. Respondents say that Estlin & Co. had not, at the time of the making of the trust deed, taken up any of the old notes and had no right to make a demand on their father on that score, and that consequently the said trust deed was founded on no consideration and void, and that they believe the said trust deed was made to hinder delay and defraud the other creditors of their father.

Respondents admit that complainants hold the notes

mentioned in the bill, but aver they came into their hands in place of the old notes, which were not held by Estlin & Co. when the trust deed was given, and they admit their father's bankruptcy, and that Valiant is his assignee.

Respondents deny that their father told Estlin there were no prior liens on the lands or that Estlin found no such liens on examination; they say, on the contrary, that their father did tell him of the Bosley trust deed, and that he treated the fact with indifference, declaring it was a mere bagatelle, and made no difference.

Respondents aver that Bosley acquired a perfect title to the lands contained in the Estlin trust deed, which title they say he conveyed to them. They say that their father was indebted to Bosley, and they deny the alleged agreement to release the Mississippi lands and discharge their father's debt, or that the sale by Bosley and the proceedings to correct the mistake were fraudulent and collusive, and they say that the purchase from Bosley by the respondent, Victor Montgomery, was *bona fide* for the real consideration of $15,000 in lawful currency.

Respondents deny that the improvements on the plantation named in the Estlin trust deed are in fine condition or on the scale stated in the bill. On the contrary, they say they are much dilapidated.

Respondents admit they had no estate of any consequence at the time of the purchase made by Victor Montgomery, and state how the money to make the purchase was obtained, denying that any of it came from their father; and they say that before the war the plantation produced annually as many as 1,200 bales of cotton, and deny that their father is still in reality the owner of it.

Respondents say that, in preparing the trust deed to secure Bosley, the attorney charged with that duty made the mistake of describing the land as situate in range 9, instead of range 8, and that it was the intention of their father to convey the lands in range 8, and that he and Bosley believed they had been so conveyed; that if Estlin had examined the records he would have found the Bosley trust deed, and instituted the least inquiry he would have discovered the truth; and they say that the assessment rolls would have shown him that their father had no land at that time in township 17, range 9 west, but was the owner and in possession of exactly the sections described in township 17, range 8 west; and respondents conclude their answer with the prayer that their title to the lands conveyed to them by Bosley may be quieted, and that all persons claiming under the Estlin deed of trust may be enjoined from disturbing their possession.

Testimony was taken on both sides; and on the 21st of November, 1872, the court rendered a decree, by which it was adjudged, (1,) that the judicial sale to Charles Bosley, on the 8th of February, 1868, and the deed made to him by the trustee, Yerger, on the same day, and the decree correcting the mistake in the Bosley trust deed, and the deed of Yerger, trustee to Bosley, were all null and void; (2) that the mistake in the description of the land conveyed by the Bosley trust deed should be corrected, and that said trust deed was a first lien on the land in controversy; (3) that the Estlin trust deed was a second lien on the land covered by the Bosley trust deed, and a first lien on the other lands embraced by it; (4) that there was due Victor, Davidella, and W. F. Montgomery, on the 30th of June, 1868, the sum of $15,000, as assignees of Bosley; and the cause is referred to special commissioners to estimate the amount

due Bosley on the 30th of June, 1868, directing them to deduct from such amount the sum of $15,000 due the Montgomerys, and report the amount of the residue due Bosley, and, furthermore, to ascertain the fair rental value of the land from the 8th of February, 1868, to date, as well as the value of permanent and valuable improvements put on the land by Victor, Davidella, and W. F. Montgomery, and the amount of taxes paid by them, and tax titles bought by them, &c., &c. (p. 96.)

On the 20th of May, 1873, the special commissioner made two reports under the said decree, (p. 98,) and on the same day, the complainants filed divers exceptions to one of the said reports (p. 164) and in like manner, the defendants Victor, Davidella and W. T. Montgomery also filed exceptions to one of the said reports. p. 166.

On the 28th of May, 1873, a decree was rendered overruling the defendants exceptions to the special commissioners' report, sustaining the reports to the amount of rents allowed by the commissioners, and sustaining divers of the complainants' exceptions, and rectifying the errors of the commissioners, and directing them to assertain what rent should be allowed for the year 1873, and directing that if complainants should not within ninety days, pay the defendants the amount due them, after deducting the rent for the current year, to be thereafter ascertained, the assignee, F. Valliant, should, as commissioner, sell the lands in question. (p. 168.)

On the 27th of September, 1873, the commissioners reported the balance due the Montgomerys after deducting the rent for the current year, and on the 28th of January, 1874, this report was confirmed and adopted by the Court, as was also the report of Valliant, assignee, under a previous decretal order, leasing the land in question to the Montgomerys for a year (p. 184), and, on the 9th of February, 1874, Valliant, the assignee, was ordered

SUPREME COURT OF THE UNITED STATES.

NEW ORLEANS CANAL & BANKING CO., *et. al.*
vs.
A. B. MONTGOMERY, *et. al.* } No. 21.

Supplemental Brief for the Appellants.

The Bosley trust deed was not recorded *quoad*, the lands described in the Estlin trust deed, because of the failure to identify in the former deed the lands intended to be conveyed thereby.

25 Ill., 285—*Rodgers* vs. *Kavanaugh*;
10 Vt., 555—*Sanger* vs. *Craigue*;
3 Gratt., 545—*Mundy* vs. *Vawter, et al.*;
21 Iowa, 49—*Nelson* vs. *Wade*;
44 Missouri, 312—*Terrell* vs. *Andrew County*;
18 Johnson, 544—*Beekman* vs. *Frost*;
40 Md., 338—*Brydeu* vs. *Campbell*;
20 Ohio, 267—*Jenning* vs. *Wood.*

P. PHILLIPS,
for Appellants.

to sell, forthwith, the land in question theretofore directed to be sold by the final decree (p. 184).

Assignment of Errors.

It is submitted that the decree is erroneous—(1,) in correcting the alleged mistake in the Bosley trust deed, and setting up the same so corrected; (2,) in giving the Bosley trust deed priority over the Estlin trust deed; (3,) in that the infant defendants, Davidella and W. F. Montgomery, were not represented by a guardian *ad litem*; and (4,) in that divers sums are allowed the Montgomerys for cleaning out ditches, furnishing fence rails, which are not permanent improvements, and for erecting a new dwelling house, which was unnecessary.

For the argument, reference is made to the brief of THOMAS HUNTON, Esq.

P. PHILLIPS,
for Appellants.